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No. 05-1256

IN THE

Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300

THEODORE J. BOUTROUS, JR.
Counsel of Record
THOMAS H. DUPREE, JR.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Amicus Curiae

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QUESTION PRESENTED

This case involves a $79.5 million punitive damage award to a single individual—the widow of a smoker—that is more than 97 times the jury's substantial award of compensatory damages. Although this Court held in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 425 (2003), that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"—and that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee"—the Oregon Supreme Court upheld the award in full, deeming Philip Morris's conduct so "reprehensible" as to "override" the constitutional mandate of proportionality.

Amicus will address the question whether the Oregon Supreme Court misapplied and effectively nullified the requirement that a punitive damage award be reasonable and proportionate to the compensatory damage award, in direct conflict with this Court's decisions in *State Farm* and *BMW v. Gore*, 517 U.S. 559 (1996), as well as the decisions of federal courts of appeal and other state courts of last resort.

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 133 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 725 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached in the Addendum.

The questions presented by this case are not unique to Philip Morris or the tobacco industry. Virtually all corporations are vulnerable to arbitrary and excessive punitive damage awards when juries are not given adequate instructions, and reviewing courts decline to enforce the due process guideposts that help ensure reasonableness and proportionality. Because plaintiffs routinely seek punitive damages in product liability cases, the fair administration of punitive

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to Rule 37.6, PLAC states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than PLAC or its counsel made a monetary contribution to the preparation or submission of this brief.

civil sanctions is an issue of great importance to product manufacturers, and PLAC has filed *amicus* briefs in this Court's three most recent decisions involving constitutional excessiveness challenges to punitive damage awards: *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

As set forth below, PLAC believes that the constitutional limitations on such awards should be faithfully enforced, including the requirement that the amount of any punitive damage award bear a reasonable and proportionate relationship to the amount of the compensatory damage award.

STATEMENT

This case reflects the confusion in the lower courts over the proper application of the ratio guidepost in punitive damage cases. Respondent Mayola Williams, the widow of a smoker, sued petitioner Philip Morris USA, asserting fraud and negligence claims in connection with the death of her husband from lung cancer. Petitioner's Appendix ("Pet. App.") at 1a. An Oregon jury awarded respondent $821,485 in compensatory damages—including $800,000 in non-economic damages—and $79.5 million in punitive damages. *Id.* at 9a.

Although the trial court remitted the punitive damage award as excessive under the federal constitutional guideposts, the Oregon Court of Appeals reinstated the award in full, 48 P.3d 824 (Or. Ct. App. 2002), and the Oregon Supreme Court denied review. 61 P.3d 938 (Or. 2002). This Court then granted certiorari, vacated the Court of Appeals' judgment, and remanded for reconsideration in light of *State Farm*. 540 U.S. 801 (2003). On remand, the Court of Appeals again held that the full award must be reinstated, notwithstanding the more rigorous *State Farm* standards. Pet. App. 35a.

The Oregon Supreme Court affirmed. The court acknowledged that the 97:1 ratio of punitive to compensatory damages exceeded the constitutional limits set forth in *State Farm*, stating that the ratio "substantially exceed[s] the single-digit ratio (9:1) that the Court has said ordinarily will apply in the usual case." Pet. App. 31a. Nonetheless, the court reasoned that Philip Morris's allegedly high level of reprehensibility sufficed to "overrid[e]" the ratio guidepost, explaining:

> Single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.

Pet. App. 33a. Construing "all facts in the light most favorable to plaintiff," the court concluded that "the jury's $79.5 million punitive damage award against Philip Morris comported with due process." *Id.* at 2a, 33a. The court also held that Philip Morris was not entitled to a jury instruction providing, in part, that "[t]he size of any punishment should bear a reasonable relationship to the harm caused to [respondent's husband] Jesse Williams by the defendant's punishable misconduct." *Id.* at 17a.

SUMMARY OF ARGUMENT

The principle of proportionality—that a civil sanction must be reasonable and proportionate to the harm committed by the defendant—has a long pedigree in American constitutional and common law. This principle is reflected and enshrined in this Court's punitive damages jurisprudence. In *State Farm*, the Court emphasized the importance of "ensur[ing] both reasonableness and proportionality" in assessing punitive damages, holding that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 538 U.S. at 426-28.

In the context of punitive damages, the proportionality requirement is given force through the ratio guidepost, which limits punitive damage awards a low multiple (or fraction) of the compensatory damage award in all but the most unusual cases. The ratio guidepost has particular importance in product liability cases, which can involve large awards of compensatory damages and where the jury is often asked to award punitive damages against the backdrop of a complex design decision, competing expert testimony, and a consumer who was injured in the course of using the product. In such circumstances, jurors may be swayed by bias or prejudice against large, out-of-state corporations and be tempted to reward a sympathetic plaintiff with a large award of punitive damages.

The decision below runs roughshod over the ratio guidepost, effectively rendering it a nullity. The Oregon Supreme Court's ratio analysis cannot be reconciled with this Court's decisions in *State Farm* and *Gore*, and directly conflicts with the approach followed by other courts.

Review is warranted to clarify the proper application of the ratio guidepost. The Oregon Supreme Court's holding that the ratio guidepost may be "overridden" any time a court concludes that the defendant acted with a high level of reprehensibility has no basis in this Court's punitive damages jurisprudence and, when coupled with the court's holding that the facts must be viewed in the light most favorable to the plaintiff, drains the due process guideposts of any constraining force. Review is further warranted to dispel the confusion surrounding *State Farm*'s holding that a 1:1 ratio may be the constitutional maximum in cases where the compensatory damages are "substantial," and that where, as here, a plaintiff recovers non-economic damages, a lower ratio is required. *See* 538 U.S. at 426. Finally, this Court should hold that juries must be instructed on the "reasonable relationship" requirement, just as it held in *State Farm* that juries must be instructed on the territorial limitations the Constitution places on punitive damage awards.

ARGUMENT

This Court has repeatedly recognized that "punitive damages pose an acute danger of arbitrary deprivation of property." *State Farm*, 538 U.S. at 416-17 (quotation omitted). Punitive damage claims raise the danger that juries "will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).

Because "'elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose,'" the Due Process Clause "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at 416-17 (quoting *Gore*, 517 U.S. at 562, 574). The Court has held that excessiveness should be determined by reference to three guideposts: (1) the reprehensibility of the defendant's conduct; (2) the ratio between punitive and actual or potential damages; and (3) the difference between the award and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418. "The[se] principles . . . must be implemented with care, to ensure both reasonableness and proportionality." *Id.* at 428.

Although the Oregon Supreme Court erred in applying all three constitutional guideposts in this case, its approach to the ratio requirement is particularly misguided and directly conflicts with this Court's decisions in *Gore* and *State Farm*, as well as decisions of federal courts of appeal and other state courts of last resort.

I. THE RATIO REQUIREMENT IS CRITICAL IN PRODUCTS CASES.

The principle that punitive damages "must bear a 'reasonable relationship' to compensatory damages has a long pedigree," dating back at least 700 years. *Gore*, 517 U.S. at 580-81. This Court has repeatedly "endorsed the proposition

that a comparison between the compensatory award and the punitive award is significant," *id.* at 581, most recently in *State Farm*, where the Court emphasized that, as a matter of due process, "courts *must* ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." 538 U.S. at 426 (emphasis added). *See also United States v. Bajakajian*, 524 U.S. 321, 333 (1998) (criminal forfeiture violated the Excessive Fines Clause in part because there was no proportionality between the fine and the "harm caused" by the offending conduct).

The ratio guidepost is particularly important in product liability cases, where juries frequently award large amounts of compensatory damages—often containing a substantial non-economic component—so that even a 1:1 ratio can result in a severe sanction. *See, e.g., Buell-Wilson v. Ford Motor Co.*, No. GIC800836 (Cal. Super. Ct. Aug. 19, 2004) (upholding $75,000,000 in non-economic damages and a $75,000,000 punitive damage award even though the vehicle design complied with government safety standards and industry custom). Moreover, in many such cases the defendant's level of reprehensibility is low: the alleged defect is not readily apparent, and the claim involves a reasonable disagreement over a complex design judgment that the manufacturer made in good faith. Jurors in such cases are confronted with deciding whether a product creates "too much risk" in the context of individual cases involving tragic personal injuries, using hindsight, on the basis of a highly technical record and arcane and often conflicting opinion testimony from engineers and scientists. *See* Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 59 (1992); *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring).

As a result, jurors are not always well suited to make judgments concerning punitive damages in product liability cases. *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 Stan. L. Rev. 547, 586-90 (2000) (noting that jurors often demonstrate bias against companies that en-

gage in risk-safety balancing); Reid Hastie *et al.*, *Looking Backward in Punitive Judgments: 20-20 Vision?*, in Cass R. Sunstein *et al.*, *Punitive Damages: How Juries Decide* 96, 108 (2002) (concluding that "hindsight bias is almost inevitable when jurors make punitive damages decisions"). *See also* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 Colum. L. Rev. 1531, 1534 (1973) ("courts are not suited to the task of establishing specific product safety standards in the course of applying general reasonableness tests to determine the adequacy of allegedly defective products"); James A. Henderson, Jr., *Design Defect Litigation Revisited*, 61 Cornell L. Rev. 541 (1976).

The result is that product liability cases pose great danger that juries will "use their verdicts to express biases against big businesses," *Oberg*, 512 U.S. at 432. Faithful application of the ratio guidepost helps ensure that any award of punitive damages is reasonable and proportionate to the harm to the plaintiff.

II. THE DECISION BELOW CIRCUMVENTS THE CONSTITUTIONAL LIMITS ON PUNITIVE DAMAGES AND WORSENS THE CONFUSION IN THE LOWER COURTS.

The petition in this case ably sets forth the reasons why guidance from this Court is needed. This brief focuses more narrowly on several specific ways in which the Oregon Supreme Court misapplied the ratio requirement, in direct conflict with decisions from this and other courts.

A. Review Is Warranted To Clarify That A Finding Of Reprehensibility Cannot "Override" The Constitutionally-Mandated Ratio Requirement.

Under the Oregon Supreme Court's approach, a court need only pronounce conduct to be highly reprehensible and *any* punitive damage award may be upheld—even those that are grossly disproportionate to the compensatory damage

award. By holding that the "extraordinarily reprehensible" behavior of the defendant, Pet. App. 33a, and the "extreme and outrageous circumstances" of the case, *id.*, can "override" the ratio requirement and save from unconstitutionality a punitive damage award 97 times the amount of compensatory damages awarded, the decision below effectively nullifies the constitutional requirement of proportionality enshrined in the Due Process Clause and reflected in *State Farm* and *Gore*. *See* Pet. for Cert. at 8-14.[2]

This Court has never suggested that the three due process guideposts are independent factors in the sense that one may offset or trump another. Rather, each guidepost operates separately to cabin a punitive damage award to a constitutionally acceptable level that reflects fair notice of the severity of the penalty that may be imposed. Consequently, although reprehensibility may move the acceptable ratio within the established range of proportional damages, it does not render the ratio guidepost inapplicable, as the court below held. The Oregon Supreme Court's approach—allowing the reprehensibility guidepost to trump considerations of ratio—conflicts with *Gore* and with *State Farm*'s mandate that "courts *must* ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426 (emphasis added).

As Justice Breyer explained in his concurrence in *Gore*, assessing the "reprehensibility" of a defendant's conduct

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[2] As the petition explains, the wildly disproportionate award was the result of the trial court's authorizing the jury to punish Philip Morris for alleged harms suffered by non-parties. *See* Pet. for Cert. at 14-22. *State Farm*, however, squarely rejected this approach, explaining that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." 538 U.S. at 423. That is because "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." *Id.*

"provides little guidance on how to relate culpability to the size of an award." 517 U.S. at 590. Focusing on reprehensibility and disregarding ratio, as the Oregon Supreme Court did in this case, thus renders an excessiveness inquiry a largely subjective exercise, particularly given that some courts "make 'reprehensibility' a concept without constraining force." *Id.* Moreover, by concluding that the ratio guidepost may be overridden in "high reprehensibility" cases, the Oregon Supreme Court held it inapplicable in precisely those cases where the objective, constraining force of ratio analysis is *most* necessary: those where the facts present a particular danger that the jury may be swayed by bias or prejudice, or otherwise be tempted to return a grossly excessive and unconstitutional award.[3]

The Oregon Supreme Court's approach jettisons one of the most fundamental tenets of common law and constitutional jurisprudence: the basic retributive requirement of proportionality between punishments and wrongs. This Court has long recognized this principle in a variety of contexts. *See, e.g., United States v. Bajakajian*, 524 U.S. 321, 334 (1998) ("The amount of the [punishment] must bear some relationship to the gravity of the offense that it is designed to punish."); *Weems v. United States*, 217 U.S. 349, 366-67 (1910) (declaring it "a precept of the fundamental law" as well as "a precept of justice that punishment for crime should be graduated and proportioned to offense"). As the Court stated in *Solem v. Helm*, 463 U.S. 277, 284 (1983), "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence."

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[3] In this regard, the Oregon Supreme Court's decision to "construe all facts in favor of plaintiff, the party in whose favor the jury ruled" for purposes of reviewing punitive damages, Pet. App. 23a, is particularly misguided. *See* Pet. for Cert. at 22-28. This approach permits a court, as the Oregon court did here, to defer to the plaintiff's version of events, deem the defendant to have engaged in "highly reprehensible" conduct based on that skewed depiction, and then declare the ratio guidepost inapplicable.

The Oregon Supreme Court's decision also conflicts with Ninth Circuit precedent establishing that reprehensibility *cannot* be used to override the ratio guidepost. In *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005), the court explained that this Court has provided "a rough framework for evaluating whether there is a reasonable relationship between the punitive damages award and the actual or likely harm associated with the wrongful conduct." In reducing a punitive damage award as grossly excessive and unconstitutional, the court recognized that the reprehensibility analysis operates within the limits set by the ratio guidepost. *See id.* (explaining that low ratio is appropriate "where there are significant economic damages and punitive damages are warranted," whereas a higher ratio may be appropriate "[i]n cases with significant economic damages and more egregious behavior" or "in cases where there are insignificant economic damages but the behavior was particularly egregious").

A recent decision from the California Court of Appeal mirrors the Oregon court's erroneous approach. In *Bullock v. Philip Morris USA, Inc.*, 2006 WL 1044161 (Apr. 21, 2006), the court upheld a 33 to 1 ratio in a case involving an undeniably "substantial" compensatory damage award of $850,000. The court held that "[a]lthough this ratio significantly exceeds single digits, we conclude that the extreme reprehensibility of Philip Morris's misconduct . . . justifies the greater ratio." *Id.* at *26. Relying on California Supreme Court precedent, the court concluded that "'extreme reprehensibility' is a special justification that can overcome the presumption against an award exceeding a single-digit ratio." *Id.* at *27 (citing *Simon v. San Paolo U.S. Holding Co.*, 35 Cal. 4th 1159, 1182-83 (2005)). The dissent argued that the majority had misapplied *State Farm* and the ratio guidepost, stating that "because [the plaintiff] received substantial compensatory damages, the ratio of punitive damages to compensatory damages may be no more than 9 to 1." *Bullock*, 2006 WL 1044161, at *30 (opinion of Kitching, J.).

Other courts have also adopted this misguided and incorrect approach. For example, the Texas Court of Appeals upheld a punitive damage award 20 times the amount of significant compensatory damages awarded for a trespass action. *Mission Res., Inc. v. Garza Energy Trust*, 166 S.W. 3d 301 (Tex. Ct. App. 2005). Acknowledging the magnitude of the ratio, the court nonetheless concluded that "[a]lthough the harm suffered by appellees may have been compensated by the jury's award of damages, the highly unlawful nature of [the defendant's] conduct (it being a breach of contract, an intentional tort, and felony theft) prevents this Court from concluding that the ratio 20 to 1 was grossly excessive." *Id.* at 319. Similarly, the Arkansas Court of Appeals upheld a punitive damages award more than 17 times the substantial compensatory damages awarded for a defamation claim, explaining that the "conduct by appellant . . . is such that a 17.6-to-1 ratio is not breathtaking." *Superior Fed. Bank v. Jones & Mackey Constr. Co.*, 2005 WL 3307074 (Ark. Ct. App. Dec. 7, 2005).

Review is warranted to resolve these conflicts and to correct the Oregon Supreme Court's misapplication of *Gore* and *State Farm*. In fact, since this Court reversed the Oregon Supreme Court in *Oberg* more than a decade ago, and held that the Fourteenth Amendment requires Oregon to provide judicial review of punitive damage awards for excessiveness, the Oregon Supreme Court has never reduced a punitive damage award as unconstitutionally excessive. *See Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473, 487-90 (Or. 2001) (applying *Gore*, but approving an 87:1 ratio in light of the defendant's "particularly egregious acts"); *Lakin v. Senco Prods., Inc.*, 987 P.2d 463, 476 (Or. 1999) (affirming $4 million punitive damage award in product liability action); *Oberg v. Honda Motor Co., Ltd.*, 888 P.2d 8, 14 (Or. 1995) (on remand) (upholding ratio in excess of 5:1 in product liability action even where compensatory damages were more than $900,000). Indeed, even though this Court reversed the Oregon Supreme Court in *Oberg* and remanded for an exces-

siveness review, the lower court simply upheld its prior decision.

B. The Oregon Court's Approval Of A 97:1 Ratio Typifies The Confusion In The Lower Courts.

Although this Court has been "reluctant to identify concrete constitutional limits on the ratio," *State Farm*, 538 U.S. at 424, many lower courts have interpreted this reluctance as a license to approve wildly disproportionate ratios that bear little relation to the actual harm suffered by the plaintiff. The decision below epitomizes this approach and thus presents an excellent vehicle for this Court to clarify the proper application of the ratio guidepost and "'help[ ] to assure the uniform general treatment of similarly situated persons that is the essence of law itself.'" *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (quoting *Gore*, 517 U.S. at 587 (Breyer, J., concurring)).

1. By approving a 97:1 ratio, the decision below directly conflicts with *State Farm* and *Gore*. In *State Farm*, the Court held that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. The Court further recognized that in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), it had concluded "that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." 538 U.S. at 425. The Court also emphasized that it had "cited that 4-to-1 ratio again in *Gore*," and "further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Id.* (citing *Gore*, 517 U.S. at 581). Finally, the Court held that where "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

As the court below conceded, a 97:1 ratio is excessive and unconstitutional under this Court's precedents. (If the ratio is calculated using the statutorily-capped amount of compensatory damages, the ratio rises to 152:1.) As the Oregon Supreme Court frankly acknowledged: "Either way, the second *Gore* guidepost is not met. All arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the Court has said ordinarily will apply in the usual case." Pet. App. 31a.

Although *State Farm* did not categorically prohibit ratios exceeding 9:1, the Court made clear that such awards were reserved for a very limited class of cases. Ratios exceeding a single-digit value, the Court explained, *may* comport with due process where "'a particularly egregious act has resulted in only a small amount of economic damages'" or where "'the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine.'" 538 U.S. at 425 (quoting *Gore*, 517 U.S at 582). None of those circumstances is present in this case.

2. Guidance is also needed as to how the ratio guidepost should be applied in cases where, as here, the compensatory damage award is substantial. Many courts, including the court below, have either misapplied or outright ignored this Court's holding that where "compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425 (emphasis added). Indeed, whereas the court below quoted this language from *State Farm*, Pet. App. 30a, it proceeded to disregard it in its ratio analysis—even though a compensatory award of more than $800,000 is undeniably "substantial." *Cf. State Farm*, 538 U.S. at 429 (noting that a $1 million compensatory award is "substantial").

Here too, the Oregon court's incorrect approach mirrors the approach of other courts that have essentially jettisoned this aspect of *State Farm*. As the Ninth Circuit has declared, "*State Farm*'s 1:1 compensatory to punitive damages ratio is

not binding, no matter how factually similar the cases may be." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014-15 (9th Cir. 2004). *See also McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1231 (N.D. Ala. 2003) (explaining that "a red flag goes up" only if the award exceeds a 9:1 ratio, and suggesting that any lower ratio "presumptively passes muster under the Due Process Clause"); *Jones v. Rent-A-Center, Inc.*, 281 F. Supp. 2d 1277, 1289 (D. Kan. 2003) (reasoning that *State Farm* "guides this court to conclude that . . . a single-digit ratio likely is constitutionally permissible").

This trend is especially apparent in several recent decisions involving products, a number of which (like this case) were vacated by this Court and remanded for reconsideration in light of *State Farm*. For example, in *Romo v. Ford Motor Co.*, 113 Cal. App. 4th 738 (Cal. Ct. App. 2003), another case GVR'd for reconsideration in light of *State Farm*, the California Court of Appeal held that a 5:1 ratio was appropriate in a defective design case, even though the compensatory damage awards of approximately $5 million were undeniably "substantial," and even though a significant portion of the compensatory awards reflected non-economic harm. The court made clear that it did not consider itself "strictly constrained by the single-digit multiplier set forth in *State Farm*," *id.* at 763, let alone by this Court's holding that a 1:1 ratio may be required where compensatory damages are substantial.

Similarly, in *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570 (Or. Ct. App. 2003), the plaintiff was injured when her fishbowl shattered. She sued the manufacturer, and was awarded $100,000 in compensatory damages and $1 million in punitive damages. Following a GVR from this Court, the Oregon court declined to reduce the award to a 1:1 ratio, but rather held that "the maximum constitutionally permissible award in this case is four times the compensatory damages for which defendant is responsible," *id.* at 576, and imposed a $400,000 sanction. Likewise in *Bocci v. Key Pharmaceuticals, Inc.*, 76 P.3d 669, *modified*, 79 P.3d 908 (Or. Ct. App.

2003), the court upheld a 7:1 ratio following a GVR from this Court.

The approach followed by the courts noted above conflicts with the approach followed by the Eighth Circuit. In *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-03 (8th Cir. 2005), the court held that even though it found the defendant's conduct "highly reprehensible," under *State Farm* a 1:1 ratio was the constitutional maximum given the substantial compensatory damage award of $4 million. The court explained that "[n]otwithstanding the absence of a simple formula or bright-line ratio, ... [f]actors that justify a higher ratio, such as the presence of an 'injury that is hard to detect' or a 'particularly egregious act [that] has resulted in only a small amount of economic damages,' are absent here." *Id.* at 603 (quoting *Gore*, 517 U.S. at 582). Similarly, in *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004), the court explained that a "large compensatory award" of $600,000 "is a lot of money" and accordingly reduced the punitive damage award under *State Farm* to achieve a 1:1 ratio. *See also Ceimo v. Gen. Am. Life Ins. Co.*, 137 Fed. Appx. 968, 970 (9th Cir. 2005) (affirming remittitur to achieve approximate ratio of 1:1); *Clark v. Chrysler Corp.*, 436 F.3d 594, 613-14 (6th Cir. 2006) (Kennedy, J., concurring) (stating that "I believe that $235,629.13 is . . . a substantial compensatory award" and therefore that a 1:1 ratio is the constitutional maximum under *State Farm*).

This Court should grant review to confirm that the 1:1 ratio in cases where the compensatory damages are "substantial" is a meaningful limitation on punitive damage awards. Indeed, in many cases, even a 1:1 ratio can result in an excessive and unconstitutional sanction.

3. The Oregon court further misapplied *State Farm* in refusing to reduce the ratio based on the fact that more than 97 percent of the award was in non-economic damages. Pet. App. 29a (noting that "Plaintiff suffered relatively small economic damages for Williams's wrongful death—less than $25,000").

In *State Farm*, the Court held that a low ratio is warranted where, as here, the compensatory damage award contains a significant amount of non-economic damages. Observing that the compensatory award consisted of $1 million in emotional distress damages, the Court explained that:

> The compensatory damages for the injury suffered here . . . likely were based on a component which was duplicated in the punitive award. Much of the distress was caused by the outrage and humiliation the [plaintiffs] suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.

538 U.S. at 426 (citing Restatement (Second) of Torts § 908, Comment c, p. 466 (1977) ("In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both")).

In this case, $800,000 of the jury's $821,485 compensatory award was in non-economic damages. Pet. App. 9a. Because these considerations were then duplicated in the punitive award, a lower ratio was required.

Other courts have adopted the Oregon court's incorrect approach to non-economic damages. For example, in the Utah Supreme Court's decision on remand in *State Farm* itself, the court held that the presence of non-economic damages actually required an *increase* in the punitive damage award. The court stated that it had "no difficulty concluding that conduct which causes $1 million of emotional distress and humiliation is markedly more egregious than conduct which results in $1 million of economic harm." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 418 (Utah 2004), *cert. denied*, 543 U.S. 874 (2004); *see also Buell-Wilson* (imposing $75,000,000 in compensatory d mages,

largely for non-economic harm, and $75,000,000 in punitive damages).

Non-economic damages are now plagued by the same problems as punitive damages, such as inadequate guidance to juries, lack of objective criteria against which to measure outcomes, and the general absence of principled bases for judicial review—all of which leads to radically varying and arbitrary awards. *See* Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of our Tort System*, 90 Va. L. Rev. 1401, 1417 (2004) ("without rational criteria or defined limits, the pain and suffering award becomes the same arbitrary deprivation of property as were punitive damage awards before" *State Farm* and *Gore*). Review is warranted for this reason as well.

4. Finally, the Oregon Supreme Court held that the trial court properly denied Philip Morris's request for a "reasonable relationship" instruction on punitive damages. The proposed instruction stated, in relevant part, that "[t]he size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct." Pet. App. 17a.

The proposed instruction was undeniably a correct statement of law. *See State Farm*, 538 U.S. at 426; *Gore*, 517 U.S. at 581. Moreover, such an instruction would help cabin a jury's determination of punitive damages and reduce the likelihood of the jury returning a grossly excessive and unconstitutional award. *See Haslip*, 499 U.S. at 19 (citation omitted) (warning that "unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities"). In *State Farm*, this Court held that juries must be instructed on the constitutionally-imposed *territorial* limitations on punitive damage awards, explaining that "[a] jury *must* be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." *State Farm*, 538 U.S. at 422 (emphasis added). This Court should grant review and hold that juries must be

instructed on the constitutionally-imposed "reasonable relationship" limitation as well.

The Oregon Supreme Court's ruling on this issue conflicts with the approach followed by the Fourth Circuit. In *Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1415, 1418 (4th Cir. 1992) (en banc), the court held Virginia's punitive damage charge unconstitutional because the jury was not required to be instructed that punitive damages must be proportional to compensatory damages. *See also Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-10 (4th Cir. 1991) (jury imposing punitive damages under South Carolina law must be instructed that "any penalty imposed should bear a relationship to the nature and extent of the conduct and the harm caused").

CONCLUSION

As the decision below vividly demonstrates, the lower courts are confused over how to apply the ratio guidepost. This case presents an excellent vehicle for resolving these important and recurring questions.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Of Counsel:
HUGH F. YOUNG, JR.
PRODUCT LIABILITY
ADVISORY COUNCIL, INC.
1850 Centennial Park Drive
Suite 510
Reston, VA 20191
(703) 264-5300

THEODORE J. BOUTROUS, JR.
Counsel of Record
THOMAS H. DUPREE, JR.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5306
(202) 955-8500

Counsel for Amicus Curiae

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ADDENDUM

CORPORATE MEMBERS OF THE PRODUCT LIABILITY ADVISORY COUNCIL

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Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company

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